92-687

No.

Supreme Court, U.S.
FILED
OCT 16 1992
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLMAR ELECTRIC SERVICE, INC.
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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October 16, 1992

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QUESTIONS PRESENTED

1. Whether a professional union organizer who expressly seeks employment in order to organize an employer's workforce is a *bona fide* "employee applicant" or "employee" within the meaning of the National Labor Relations Act, 29 U.S.C. § 152(3).

2. Whether a professional union organizer who seeks employment in order to organize an employer's workforce, even if held to be a bona fide "employee applicant," constitutes such a risk of disloyalty that the employer may reject the union agent's job application on that ground without violating Sections 8(a)(1) and 8(a)(3) of the Act.

3. Whether the policies underlying the Act, which recognize and codify an adversarial relationship between unions and employers, support a requirement that employers be forced to hire union employee/agents whose announced objective is to gain access to the employer's workplace in order to serve the organizational interests of the employer's adversary, the union.

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NATIONAL LABOR RELATIONS BOARD

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the opinion and order of the Court of Appeals for the District of Columbia Circuit, rendered in these proceedings on July 21, 1992.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 968 F.2d 1327 (D.C. Cir. 1992) and is reproduced in the Petitioner's Appendix ("Pet. App.") at A1-A8. The pertinent opinions and orders of the National Labor Relations Board and the Administrative Law Judge are reported at 303 NLRB No. 33 (May 31, 1991) and are reproduced at Pet. App. A9-A47.

JURISDICTION

The National Labor Relations Board exercised jurisdiction over the Petitioner in accordance with Section 10 of the National

Labor Relations Act, 29 U.S.C. §160, as the Petitioner is an employer affecting commerce. Jurisdiction in the Court of Appeals was premised on Section 10(f) of the National Labor Relations Act, 29 U.S.C. §160 (f). This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §152:

"When used in this subchapter —

* * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . ."

29 U.S.C. §157:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

29 U.S.C. §158:

"(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(3) by discrimination in regard to hire or tenure of employment of any term or condition of employment to encourage or discourage membership of any labor organization . . . ."

STATEMENT OF THE CASE

A. Facts

Willmar Electric Service, Inc. ("Willmar") is a multi-state electrical contractor headquartered in Willmar, Minnesota. In the early summer of 1988,[1] Willmar received a contract to perform electrical work on a J.C. Penny store under construction in Silverdale, Washington. J.A. 4.[2]

Upon learning that Willmar would be the electrical sub-contractor on the Penny project, Michael C. Hendrix, a full-time field organizer for Local Union No. 46 of the International Brotherhood of Electrical Workers (the "Union"), contacted Willmar officials about entering into an agreement with the Union for the project. J.A. 5. For the remainder of the year, Hendrix had frequent conversations with Willmar officials about this subject, despite the fact that he was told that Willmar was not interested in signing an agreement with the Union, but that it was interested in accepting applications from union members to staff the project. J.A. 56; 190.

In early September, Hendrix wrote a letter to an official at Willmar's headquarters, on Union stationary, requesting that it reconsider its position in signing a project agreement with the Union and that Willmar provide Hendrix with employment applications. The letter was signed by Hendrix in his capacity as "I.B.E.W. Local #46 Field Organizer." J.A. 217. Consistent with its prior position, the company informed Hendrix that it

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[1] All dates are in 1988, unless otherwise indicated.

[2] "J.A." refers to the parties' joint appendix in the court of appeals.

would accept employment applications from members of the Union and it sent an employment application to Hendrix on or about September 16. J.A. 195.

With the acquiescence of his superior and with the knowledge of four other Union organizers (J.A. 41), on October 14 Hendrix hand-delivered two completed employment applications to Willmar's project foreman, Douglas Rose. One application was that of a Union member, while the other was that of Hendrix himself. J.A. 15-16. On the employment history section of the application, Hendrix identified his present employer as "I.B.E.W. Local #46" and wrote to "work in the field" as the reason for his desire to work for Willmar. J.A. 218-219.

On November 25, Hendrix circulated a flyer stating that Willmar (and its general contractor) were paying substandard wages. The flyer was handed out at nine area J.C. Penny stores. J.A. 278; 42-43. Several days later, Hendrix delivered a letter to the general contractor's superintendent contending that employees on the Silverdale project were receiving substandard wages and benefits and that the Union intended to picket the job site. Attached to the letter was a copy of "Instructions to Pickets," which was printed on union stationary, and which directed that all questions be directed to "Mike Hendrix, I.B.E.W. Local #46" at the Union's address. The letter, written on Union stationary and signed by Hendrix as "I.B.E.W. Local Field Organizer" requested that the general contractor report violations of the picketing instructions directly "to the undersigned." J.A. 278A-C. A copy of the letter and attachment was hand-delivered by Hendrix to Willmar's foreman. J.A. 7-8; 46-47. The following day, Hendrix and others began picketing Willmar at the job site, carrying signs which stated: "Willmar Electric, Substandard Wages." The picketing continued until December 15.

On December 30, Hendrix again approached Rose about obtaining employment. Hendrix told Rose that he was looking

for a position with Willmar in order to organize its employees, but that he would limit his organizing activities to employees' lunch periods and after work hours. J.A. 52, 146. Rose responded that while he was hiring, he never seriously considered Hendrix for employment because he was working as a field organizer for the Union on a full-time basis and had openly expressed his intention to continue to pursue his organizing attempts if employed by Willmar. J.A. 145-147; 167. Thus, Rose told Hendrix that "its kind of hard to hire you when you're out there on the other side, picketing."[3] J.A. 19-20. Consequently, Willmar never hired Hendrix, although other applicants, who applied for employment after Hendrix, were offered positions with Willmar. Less than two weeks later, Hendrix filed the unfair labor practice charges which led to this appeal.

B. Procedural History

On January 11, 1989, the Union filed an unfair labor practice charge against Willmar alleging that Willmar refused to hire seven individuals because of their union activities. J.A. 204-216. The charge was filed by Hendrix in his capacity as "representative" of the Union. Also on January 11, 1989, Hendrix filed a similar unfair labor practice charge on his own behalf. In that charge, Hendrix alleged that Willmar refused to employ or otherwise consider him for employment because of his "union activities, affiliation and/or sympathies." J.A. 204-216.

On February 22, 1989, the National Labor Relations Board (the "Board") issued a Consolidated Complaint and Notice of Hearing based on Hendrix's charges. The Complaint alleged, *inter alia*, that Willmar's refusal to hire Hendrix violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) and (3) (the "Act"). After an evidentiary

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[3] Several days later, Hendrix was observed distributing union literature to Willmar's employees in the parking lot. J.A. 60-61.

hearing before an Administrative Law Judge ("ALJ"), the ALJ issued a decision finding that, despite the fact that "Hendrix was a paid, fulltime union organizer intent on organizing [Willmar's] employees," Willmar violated Sections 8(a)(1) and (3) of the Act by its refusal to hire Hendrix. Pet. App. A37. The ALJ ordered Willmar to offer Hendrix full and immediate employment and to make him whole for any losses of earnings and benefits he may have suffered as a result of Willmar's refusal to hire him.

On October 3, 1989, Willmar sought review of the ALJ's decision by the Board. In its exceptions to the ALJ's decision, Willmar asserted that as Hendrix was a full-time, paid union organizer at the time he applied for employment, it could lawfully refuse to hire him. Relying on its decision in *H.B. Zachry Co.*, 289 NLRB 838 (1988), *enf. den.*, 886 F.2d 70 (4th Cir. 1989), the Board affirmed the ALJ's decision on the basis that full-time paid union organizers are "employees" within the meaning of the Act who cannot be denied employment based on their union activity or status. Pet. App. A12. Acknowledging that its holding in *Zachry* had been reversed by the Fourth Circuit, the Board ruled as an alternative basis for affirmance that the absence of certain facts in the record rendered the instant case distinguishable from *Zachry*. Consequently, in its Decision and Order issued on May 31, 1991, the Board affirmed the ALJ's decision in its entirety. Pet. App. A13.

On July 1, 1991, Willmar filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit, requesting that the Court set aside the Board's Decision and Order. In its petition for review, Willmar asserted that the Board's order in this case should be set aside because the Board had erroneously interpreted the statutory term "employee" as defined in the Act. Moreover, Willmar contended that the Board's alternative claim that the *Zachry* case was "factually distinguishable" was contrary to the record and not supported

by substantial evidence. Willmar further argued that the policies underlying Section 8(a)(3) of the Act did not support a requirement that an employer be forced to hire an employee-agent of a labor union.

However, on July 21, 1992, the Court of Appeals denied Willmar's petition for review and granted the Board's cross-application for enforcement of its order. Pet. App. A8. Purporting to apply common law principles of agency, the Court declared that a person could have two employers at one time, apparently even where the interests of the two employers directly conflict. *Id.* at A6. The Court of Appeals implicitly rejected Willmar's claim, and the holding of the Fourth Circuit in *H.B. Zachry, Inc. v. NLRB*, that the adverse relationship between unions and employers precluded such dual employment under the Act. The Court went on to concede that Willmar had presented a "powerful case" of likely disloyalty by Hendrix, but the Court nevertheless ruled against Willmar on the ground that such disloyalty did not disqualify Hendrix from the protection of Section 8(a)(3) absent proof that Willmar would have refused to hire the organizer absent his union activities. Id. at A7. The Court inexplicably left "to another day" the issue squarely before it, *i.e.*, the issue of "when employment ties to a union establish such a risk of disloyalty that the (non-union) employer can reject or dismiss the union employee on that ground." *Id.* at A8.

REASONS FOR GRANTING THE WRIT

I. THE D.C. CIRCUIT'S CONCLUSION THAT A PROFESSIONAL UNION ORGANIZER IS AN EMPLOYEE UNDER SECTION 2(3) OF THE ACT IS IN SHARP CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS AND WITH HOLDINGS OF THIS COURT.

As detailed below, other Circuit Courts of Appeals, including the Fourth and Sixth Circuits, have on similar facts reached a conclusion opposite to the D.C. Circuit's holding in this case. *H.B. Zachry, Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989); *NLRB v. Elias Bros. Big Boy, Inc.*, 327 F.2d 421 (6th Cir. 1964). These other courts have determined that where a professional union organizer applies for a job with the primary intent of organizing the employer's workforce, he is not a bona fide employee or employee applicant under the Act and is, therefore, not entitled to the protection of Sections 8(a)(1) and (3).[4] On the other hand, the Second and Third Circuits have taken positions, without explanation, that are consistent with the D.C. Circuit's holding. *See Escada, Inc. v. NLRB*, ____ F.2d ____, 140 LRRM (BNA) 2872 (3d Cir. 1992); *NLRB v. Henlopen Mfg. Co., Inc.*, 599 F.2d 26 (2d Cir. 1979). Thus, the federal courts simply do not agree on what is meant by the term "employee" under the Act in this context. The significant uncertainty which now pervades this area of the law underscores the need for this Court's guidance.

In *H.B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989), a professional union organizer for the International Brotherhood of Boilermakers, one Barry Edwards, applied for employment

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[4] While the protections accorded under the Act extend only to "employees," 29 U.S.C. §§152(3) and 158, bona fide applicants for employment may be considered to be employees entitled to the same privileges against discrimination. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

with a non-union contractor for the avowed purpose of organizing the contractor's work force. As in the present case, during the entire time Edwards sought employment with the contractor, he was employed by the union as a business representative.

The Board ruled that the contractor's refusal to hire Edwards due to his professed affiliation with the Boilermakers as a union organizer violated Sections 8(a)(1) and (3) of the Act. *H.B. Zachry Co.*, 289 NLRB 838 (1988). According to the Board, the union organizer was a bona fide applicant, and therefore an "employee" subject to the Act's protections, regardless of his apparently divided loyalties and his admission that he sought employment with the contractor for the sole purpose of organizing its employees.

On appeal, the Fourth Circuit reversed the Board. The court ruled that Edwards, a union organizer, was not a bona fide applicant for employment, and therefore, was not covered under the Act. According to the court, the Board's contention that the definition of "employee" included an individual concurrently employed and paid by a union to organize employees of the contractor was one that "exalts form over substance." *H.B. Zachry Co. v. NLRB*, *supra*, 886 F.2d at 73. The court ruled that the union organizer could not realistically be found to be a bona fide applicant because "at core he would remain an employee of the union." *Id.* at 73. In this regard the court stated:

> So too, it would be disingenuous to say that Edwards was a job applicant in the ordinary sense of the word. Edwards was not in search of a job; he already had and would continue to have that. Edwards was looking for entry to the Zachry plant in order to fulfill his duties as an organizer.
>
> * * *
>
> It is hardly unreasonable, of course, for a company to assume that a paid organizer would prefer to stay on the job only temporarily, i.e., the length of the or-

> ganizational campaign, and not until a project was complete. It is not, however, merely the temporary nature of a full-time union organizer's interest in employment which distinguishes him or her from a bona fide applicant, but the entire character of the future employment relationship. Edwards' interest in applying to Zachry for employment was qualitatively different from that of a bona fide applicant.

Id. at 73-74.

Likewise, the U.S. Court of Appeals for the Sixth Circuit refused to enforce a Board decision which held that an employer unlawfully discharged an individual who was employed as an organizer by a labor organization. In *NLRB v. Elias Brothers Big Boy, Inc.*, 327 F.2d 421 (6th Cir. 1964), the Board ruled that Elias violated Sections 8(a)(1) and (3) of the Act by discharging a waitress who was actively involved in organizing Elias' employees on behalf of the Hotel and Restaurant Employees Union. The union did not pay the waitress a salary, but merely provided her with $15 per week for reimbursement for telephone calls to employees during the organizing efforts as well as for gasoline used in her car in driving employees home from work to discuss the union.

On appeal, the Sixth Circuit reversed the Board, ruling that, because the waitress was employed by the union prior to obtaining employment with Elias, and in light of the union's reimbursement of the waitress's organizing expenses, the waitress "was not a bona fide employee within the intent of § 2(3) of the Act." *Id.* at 427.

For the purposes of analyzing whether a professional union organizer is an employee entitled to the protections of the Act, the above cases are factually indistinguishable from this case. In each case, the employee was employed (or sought employment) simultaneously by a company and by a union. In each case, the employee sought access to the job site for the avowed

purpose, not of furthering the employer's business, but in order to organize its workforce in his or her capacity as an employee agent of the union. Despite this identity of facts and legal issues, the courts in *H.B. Zachry* and *Elias Bros.*, reached results which are diametrically opposed to and irreconcilable with the decision in this case.[5]

The D.C. Circuit's rejection of the Fourth Circuit's reading of the Act rests on a faulty application of this Court's decision in *Nationwide Mutual Ins. Co. v. Darden*, 112 S. Ct. 1344 (1992), and a misinterpretation of the common law definition of the word "employee." According to the Court of Appeals, under the common law of agency "'[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment to the other.'" Pet. App. A6. The Court of Appeals interpreted this principle as allowing a union employee/agent to claim dual employment status with the union's adversary, a targeted business. Both the *Darden* decision, however, and the common law, compel the opposite result from that achieved by the Court of Appeals.

In *Darden*, this Court held that the "statutory use of the word 'employee' should be taken to have its common law meaning unless Congress 'clearly indicates otherwise'." 112 S. Ct. at 1349. The Court issued this holding in the context of restraining the courts of appeals from expanding the reach of federal labor laws beyond the plain meaning of their terms. Thus, when the Fourth Circuit in *Darden* attempted to apply the

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[5] Although the Board attempted to distinguish the facts of the present case from those in *H. B. Zachry*, *see* Pet. App. A12, the D.C. Circuit did not base its holding on any such distinction and implicitly rejected it. *See* Pet. App. at A6. In any event, the distinctions raised by the Board, pertaining to the supposed lack of evidence of Hendrix's future employment by the Union, were contrary to the record, which showed that Hendrix fully intended to work for the Union while employed by Willmar and certainly gave that impression to the employer. J.A. 39-39A, 52, 146.

term "employee" under ERISA to individuals who it acknowledged had no common law employment relationship, this Court reversed the court of appeals for misreading the Act. The Court expressly criticized as a "feeble precedent" its own prior expansive reading of the NLRA's definition of "employee" in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 120-129 (1944).[6]

In the present case, the Court of Appeals has twisted the *Darden* opinion into a prescription for *expanding* the NLRA's definition of "employee" beyond the common sense intent of Congress, exactly what this Court sought to prevent in *Darden*. The result achieved by the Court of Appeals undermines the careful balance struck by Congress between the adversarial forces of unions and management.

Contrary to the Court of Appeals, the common law does not recognize as a bona fide employee one who seeks to serve two masters who are adversaries with each other. In such a circumstance, the performance of service to one adversary clearly constitutes abandonment of service to the other. Even that portion of the Restatement (Second) of Agency cited by the D.C. Circuit, Pet. App. at A6, expressly recognizes this principle, allowing dual employment if and *only* if "the service to one does not involve abandonment of service to the other." Restatement (Second) of Agency at 226 (1958).[7]

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[6] As further stated by the framers of the Taft-Hartley Act of 1947, in seeking to correct earlier unwarranted Board expansions of the term "employee":

> It is inconceivable that Congress, when it passed the Act, authorized the Board to give every word in the Act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give words not far-fetched meaning but ordinary meanings.

H.R. Rep. No. 245 80th Cong., 1st Sess., at 19 (1947) reprinted in NLRB, Legislative History of the Labor-Management Relations Act, 1947, at 309.

[7] The Restatement further holds: "Since. . . the relation of master and servant is dependent upon the right of the master to control the conduct of

In the context of federal labor law, these principles clearly preclude individuals from being "employed" by both a union and by the company which the union is seeking to organize. As this Court has held, the NLRA recognizes and codifies the fact that unions and management are "separate factions in warring camps." *NLRB v. Bell Aerospace Co.*, 416 U.S 267, 278 (1974), *quoting Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 494 (1947) (Douglas, J., dissenting). The Act codifies this adversary relationship in numerous ways. These include Section 8(a)(2), 29 U.S.C. § 158 which prohibits employer domination or assistance to unions, and Section 302, which prohibits payments by employers to union officials. 29 U.S.C. § 186.[8]

It ignores the realities of the workplace to assert that dual employment by labor and management is possible in an organizing context. Based upon Congress' expressed intent and the common law definition of employment, no such duality can exist as a matter of law.[9] The Court of Appeals' failure to acknowledge the adversary relationship between unions and employers is directly contrary to the common law and conflicts with decisions of this Court and the intent of Congress.

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the servant in the performance of the service, giving service to two masters at the same time normally involves a breach of duty by the servant to one or both of them." Id. at § 226.

[8] *See, e.g., Farmers Energy Corp. v. NLRB*, 730 F.2d 1098 (7th Cir. 1984) (enforcing 8(a)(2)); *Reinforcing Iron Workers Local Union 426 v. Bechtel Power Corp.*, 634 F.2d 258 (6th Cir. 1981) (enforcing Section 302). *See also H.B. Zachry Co. v. NLRB*, 886 F.2d at 75.

[9] "[An individual] cannot be a servant of two masters in doing an act as to which an intent to serve one necessarily excludes an intent to serve the other ....". Restatement (Second) of Agency Section 226, (1958). It is this pre-existing agency relationship that distinguishes the professional union organizer from a bona fide employee who is merely sympathetic to the union. *See H. B. Zachry Co. v. NLRB*, 886 F.2d at 76.

The Court of Appeals' decision also obliterates the distinction between employees and non-employee union agents only recently reaffirmed by this Court in *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841, 845 (1992). There, the Court held that "[b]y its plain terms, . . . the NLRA confers rights only on employees, not on unions or their nonemployee organizers." Accordingly, the Court in *Lechmere* reversed a Board policy which granted workplace access to union organizers as if they were entitled to the same rights as employees under the Act. *See also NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

While the D.C. Circuit claimed to see "no conflict" on this score, Pet. App. at A7, its holding plainly allows non-employee union agents to achieve under the guise of "employment" applications what the Court in *Lechmere* said they were not entitled to, *i.e.*, forced entry into the workplace under the protection of the NLRA. Certainly, the Fourth Circuit recognized the conflict arising from permitting such a result, stating:

> The Act requires only that the employer refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights. It does not require that the employer permit the use of its facilities for organization when other means are readily available. *Babcock*, 357 U.S. at 113-14, 76 S. Ct. at 684-85. To require Zachry to allow [a union organizer] to solicit and organize on its property because he was claiming entrance as a "job applicant" would render ineffective the protection offered employer's in the *Babcock* decision. *See also Central Hardware Co. v. NLRB*, 439 F.2d 1321, 132 (8th Cir. 1971) *rev'd on other grounds*, 407 U.S. 539, 92 S. Ct. 2238, 33 L.Ed.2d 122 (1972), *on remand*, 468 F.2d 252 (8th Cir. 1972) (company had right to bar union organizer from entering store because he was not a bona fide

customer as his primary purpose was to check employees, thus disrupting selling areas).

Finally, the decision of the D.C. Circuit is inconsistent with the Board's own policy of shielding the representation process and bargaining unit employees from monetary or other inducements from either unions or management. *See Owens-Illinois, Inc.*, 271 NLRB 1235 (1984) (representation election set aside due to union inducements to employees); *see also 299 Lincoln Street, Inc.*, 292 NLRB 72 (1988); *Multimatic Products, Inc.*, 288 NLRB 1279 (1988) (excluding union organizers from voting in representation elections).

The Court of Appeals has erroneously asserted that the "representation process" issue can be addressed at the time of an actual election. In fact, however, the expressed organizational purpose of the union agent in seeking employment demands that the unlawful inducement be addressed at the hiring stage. If the Board believes that monetary payments to employees may unlawfully interfere with the representation process, then it makes no sense for employers to be forced to hire employees who are known to be employed by the union for an organizational purpose.

In the present case, the evidence clearly established that at the time he applied for employment with Willmar, Hendrix was paid by and actively serving the interests of his union employer. He never informed Willmar of any intent on his part to leave the union's employ. Hendrix further stated that he would have retained his position with the union as a field organizer and that his sole purpose for seeking employment was to organize Willmar's workforce on behalf of his union employer. Under these facts, it defies common law (and common sense) and is contrary to the Act to order a company to treat such an individual as a bona fide employee applicant who must be given access to the employer's workplace. The present petition should be granted so that the conflict between the D.C. Circuit and the

Fourth and Sixth Circuits, as well as the conflict with this Court's decisions in *Darden* and *Lechmere*, can be resolved on this important issue.

II. THE D.C. CIRCUIT'S HOLDING THAT AN EMPLOYER'S REFUSAL TO HIRE A PROFESSIONAL UNION ORGANIZER ON GROUNDS OF DISLOYALTY CAN NEVERTHELESS BE DEEMED TO HAVE VIOLATED SECTION 8(a)(3) OF THE ACT, ALSO CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND OF THIS COURT.

Regardless of whether a professional union organizer should somehow be deemed to fall within the definition of an "employee/employee applicant" under the Act, the Court of Appeals should nevertheless have found that a refusal to hire such a person on grounds of a good faith belief in his likely disloyalty does not violate Sections 8(a)(1) and (3) of the Act. The D.C. Circuit's failure to decide this issue properly creates a further conflict with decisions in other circuits and of this Court. *See NLRB v. Transportation Management Corp. NLRB*, 462 U.S. 393 (1983); *NLRB v. Local Union No. 1229, IBEW*, 346 U.S. 172 (1953); *Boeing Airplane Co. v. NLRB*, 238 F.2d 188 (9th Cir. 1956); *Raytheon Co.*, 279 NLRB 245 (1986); *Lucky Stores*, 269 NLRB 942 (1984).

In the present case, the Court of Appeals assumed (correctly) that "Willmar made out so powerful a case of likely disloyalty that the Board would have had to conclude that rejection of Hendrix's application on that ground would have been legitimate and not in violation of the anti-discrimination and anti-coercion provisions of the Act." Pet. App. at A7, *citing George A. Hormel & Co. v. NLRB*, 962 F.2d 1061, 1064 (D.C.

another day" the issue of "when employment ties to a union establish such a risk of disloyalty that the (non-union) employer

can reject or dismiss the union employee on that ground." *Id.* at A8.

Contrary to the Court of Appeals, that issue is squarely presented by this case. The employer here plainly demonstrated its good faith belief that Hendrix's continued employment by the union was inconsistent with his duty of loyalty to his employer. Indeed, each of the facts previously discussed which led the employer to conclude that Hendrix was not a bona fide employee applicant, by definition, justified the employer in believing that Hendrix would be loyal only to the interest of its adversary, the union.

Under analogous circumstances, courts have held that discharge for disloyalty does not violate Section 8(a)(3). In *Boeing Airplane Co. v. NLRB*, 239 F.2d 188 (9th Cir. 1956), for example, it was held that an employee was properly discharged for encouraging employees to work for an employer's competitors. *See also Advertising Specialists*, 232 NLRB 50 (1977) (no violation of 8(a)(3) where employee discharged for competing with his employer); *Kenai Helicopters*, 235 NLRB 931, 936 (1978).

The *Boeing* case cited this Court's holding in *NLRB v. Local Union No. 1229, IBEW*, 346 U.S. 172 (1953). There, the Court upheld the discharge of certain employees who made publicly disparaging remarks about their employer. The Court quoted approvingly the following language from *Hoover Co. v. NLRB*, 191 F.2d 380, 389 (6th Cir. 1951):

> An employee can not work and strike at the same time. He can not continue in his employment and openly or secretly refuse to do his work. He can not collect wages for his employment, and, at the same, engage in activities to injure or destroy his employer's business.

Similarly, in the present case, where an applicant's likely disloyalty arises from his concurrent employment as a professional union organizer, the policies underlying the Act compel a finding that a refusal to hire the applicant does not violate Section 8(a)(3). Because of the adversarial relationship between the union and the employer, the applicant's concurrent employment by the union, and not merely his union-related activities, constitute ample cause for disloyalty on his part, and an employer is clearly justified in believing in good faith that such disloyalty is likely to occur.

Nor should Willmar have been required to demonstrate that Hendrix had in fact engaged in a disloyal act. Because he had not yet been hired, such proof would be impossible to procure. Instead, the Board itself has held that an employer is not required to wait until an actual breach of loyalty occurs to take protective action, where an employee is in a conflict situation. "Indeed, conflicts of interest are by their nature anticipatory or potential; it is the competing interests that give rise to the conflict, and the conflict continues to exist, even if the individual in whom it exists never acts in derogation of either interest." *Raytheon Co.*, 279 NLRB 245, 249 n.11 (1986). *See also Lucky Stores*, 269 NLRB 942 (1984); *Emanuel Hospital*, 268 NLRB 1344 (1984).

Thus, the Board has consistently held that it is not a violation of the Act to take an unfavorable employment action against an employee in order to protect confidential information, where the employer has a good faith belief that the employer might disclose such information to a union. *Lucky Stores*, *supra*.

It is also wrong to suggest that no likelihood of disloyalty exists so long as the union agent promises to engage in organizing activity only on his own time. By giving access to the workplace, the employer would rightly be concerned about the transmittal of sensitive information by the union agent to the employer's adversary, the union, and other similar misconduct.

Under such facts, an employer should not be compelled to accept the application of someone it knows to have an adverse employment interest. Put simply, if an individual is employed by a union to organize, then he cannot claim to be serving the interests of the firm which is the target of that organizing effort. No violation of Section 8(a)(1) and (3) should be found where the employer acts upon its good faith belief in the likely disloyalty of a paid union agent and refuses to hire the agent for that reason.

III. RESOLUTION OF THE CONFLICTS CREATED BY THE D.C. CIRCUIT'S DECISION IS OF NATIONAL IMPORTANCE BECAUSE THE EFFECT OF THE DECISION IS TO UNDERMINE THE POLICIES OF THE ACT.

As discussed above, the National Labor Relations Act places careful limits on the context in which employers and unions may pursue their competing interests. *See Carpenters' Union v. NLRB*, 357 U.S. 93, 99-100 (1958) (recognizing that the NLRA and its amendments strike a "balance . . . between the uncontrolled power of management and labor to further their respective interests"); *see also H.B. Zachry Co. v. NLRB*, 886 F.2d at 74 ("in effect, the Act defines the terms on which union and employer can compete in seeking to convince the employees of the respective pros and cons of unionization."). *See also NLRB v. Drivers Local Union*, 362 U.S. 274, 287-88 (1960) (quoting from the legislative history of section 8(b), 93 Cong. Rec. 4436).

The underlying purposes of the Act, which attempt to strike this balance between the legitimate and competing rights of unions and employers, will be undermined if the Board is allowed to compel employers to hire professional union representatives whose application for employment is merely a pretext to further the organizing interests of the union whom they represent.

As has further been shown, the D.C. Circuit's decision violates the Act by treating as indistinguishable the protected rights of employees, on the one hand, and the unprotected claims of nonemployee organizers, on the other. By elevating professional union organizers to the same protected status as bona fide employee organizers, the Court of Appeals has directly contravened the holding of this Court in *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841, 845 (1992). Again, to allow professional union organizers nearly unlimited access to an employer's private property by means of the simple expedient of filling out an employment application "would be to upset the careful balance struck by Congress." *H.B. Zachry Co. v. NLRB*, 886 F.2d at 74.

Finally, absent reversal of the Board's policy and the decision of the D.C. Circuit, a very real danger exists to the representation process. Taking the license granted by the Board to its fullest extent, unions are presently enlisting large numbers of employee/agents to infiltrate the workforces of targeted employers, just as was predicted by the Fourth Circuit.[10] Employers have been rendered helpless to avoid hiring such known agents without committing, under the Board's policy, an unfair labor practice. *See Town and Country Electric*, Case No. 18-CA-11044, *case pending* (NLRB) (mass applications of union agents lead to finding of unfair labor practice). In another recent case, the Board's General Counsel has argued that an employer must hire a paid union strike organizer as a striker *replacement*, because the Board's policy makes no distinction between professional organizer applicants and any other employee. *See Sunland Electric*, Case No. 15-CA-10618, *case pending* (NLRB). The importance of this issue is confirmed by

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[10] In *H.B. Zachry Co. v. NLRB*, 886 F.2d at 73-74, the court observed: "[The union agent] because of his simultaneous employment with the union, would essentially be paid by the union to cast his ballot in its favor. * * * If the practice here is accorded judicial approval, a union might command significant numbers of its employees to work for corporations in which elections are anticipated in order to skew the results."

the decision of the Board to hold a rare oral argument to review its policies in this area. No change in the Board's position has been forthcoming, however. *See* 54 Daily Labor Report (BNA) A-14 (March 19, 1992).

Therefore, in order to preserve the balance struck by Congress as to each aspect of national labor policy set forth above, this Court should grant the present petition and reestablish the common sense and common law distinction between professional union organizers and bona fide employee applicants.

CONCLUSION

For the foregoing reasons, petitioners pray that the Court issue a writ of certiorari to review the decision and judgment below.

Respectfully submitted

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Date: October 16, 1992

Rule 29.1 Statement. The petitioner, Willmar Electric Service, Inc., has no parent or subsidiary companies.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 8, 1992 Decided July 21, 1992

No. 91-1312

WILLMAR ELECTRIC SERVICE, INC.,

PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 46, AND MICHAEL HENDRIX,

INTERVENORS

Petition for Review of An Order of the National Labor Relations Board

Maurice Baskin for petitioner.

John H. Fawley, Attorney, National Labor Relations Board, with whom *Jerry M. Hunter*, General Counsel, *Aileen A. Armstrong*, Deputy Associate General Counsel, and *Peter Winkler*, Supervisory Attorney, were on the brief, for respondent.

John Burns for intervenors.

Before: BUCKLEY, WILLIAMS and D.H. GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge WILLIAMS*.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

WILLIAMS, *Circuit Judge:* This petition raises the issue of whether the word "employee" in § 2(3) of the National Labor Relations Act (the "NLRA" or the "Act"), 29 U.S.C. §152(3) (1988), encompasses a job applicant who is employed by a union at the time of application, seeks the job for the purpose of organizing the work force, plans to retain some kind of employment affiliation with the union, and has at least a substantial prospect of later returning to full-time employment by the union. If the applicant, Mike Hendrix, was an "employee" as the Act uses the term, he was entitled to protection from anti-union discrimination and coercion, see, e.g., § 8(a)(3) of the Act, 29 U.S.C. §158(a)(3) (1988). If he was not, then petitioner Willmar Electric Service was free to reject his job application without satisfying the National Labor Relations Board's test--i.e., without showing that it would have rejected him without regard to those aspects of his relation to the union that the Act protects (e.g., membership, protected union activities). See *Wright Line*, 251 NLRB 1083 (1980) (in "mixed motive" case, to establish unfair labor practice general counsel must show that an anti-union motive animated the decision; employer can avoid liability by showing that it would have made the same decision in the absence of the anti-union motive), enf'd, *NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981); see also *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (approving *Wright Line).* The Board ruled that despite his employment relation with the union, Hendrix was an employee for purposes of § 2(3), so that Willmar's refusal to hire him on the ground of his union activities --which Willmar does not here seek to defend under the *Wright Line* rule--violated §§ 8(a)(1) & (3). Accordingly the Board found that Willmar had committed an unfair labor practice. We find the Board's reading of § 2(3) permissible and grant its application for enforcement.

* * *

Hendrix, a journeyman electrician by trade who had just begun working as a field organizer for the relevant local of the International Brotherhood of Electrical Workers, contacted Willmar in June 1988 about the possibility of using unionized labor for its electrical work at a nearby construction project. Over the next several months it became clear that Willmar did not want to deal with the union. In October Hendrix submitted an application on behalf of himself for a job as an electrician, in which he listed his present employer as the IBEW and his reason for leaving as to "work in the field", by which Hendrix meant (according to his later testimony) that he would "be going into the field to organize actually on the job." And so, while he would "probably" stop receiving money from the union and take a cut in pay, he would "retain the title of field organizer." Hendrix made clear to Willmar's project foreman, Douglas Rose, that he intended to use his free time during lunch and after work to try to organize Willmar's employees. As he waited for a response, Hendrix continued engaging in activities on behalf of the union, such as organizing a picket line at Willmar's job site to protest the wage level. In December Rose told Hendrix that, although he was still hiring, he was not giving consideration to Hendrix's application, because "it's kind of hard to hire you when you're out there on the other side, picketing."

In September of 1989 an administrative law judge held that Willmar had violated §§ 8(a)(1) and 8(a)(3) of the Act by failing to hire Hendrix and by engaging in other coercive or discriminatory acts (including the failure to hire a man named Allen Haugen because of his suspected union sympathies). The NLRB affirmed the ALJ's rulings. Since Willmar's petition for review challenges only the holding with respect to Hendrix, we address only this order and enforce the other orders without comment.

* * *

The chief issue on appeal is whether employment ties to a union of the sort held by Hendrix bar a person from classification as an "employee" (of some entity other than the union) under § 2(3), and thus remove him altogether from the protections of §§ 8(a)(1) & (3). A few preliminary remarks are necessary to narrow this issue.

First, it makes no difference that Hendrix was not working for Willmar at the time of the alleged unfair labor practice. Applicants for employment are considered "employees" under the Act. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). So the refusal to hire Hendrix is legally indistinguishable from the firing of an employee of a company who reveals that he has just established similar ties to a union.

Second, despite Hendrix's employment ties to the union, there is no real claim that Hendrix's hoped-for job with Willmar would have been a sham. In most respects Hendrix would have been indistinguishable from a zealous volunteer who resolved to use his free time during lunch and after work to advance the union's interests. Obviously, however, his then-current job with the union (which was typical in the sense that applicants often held jobs that they would drop if accepted by Willmar) his retention of a vague union title, and his prospect of re-employment by the union might have had various subtle (or perhaps not so subtle) effects on his conduct as a Willmar worker. The nub of the controversy is whether Hendrix's employment ties to the union disqualified him from being a Willmar employee enjoying full protection of the Act.

Our analysis begins with *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and the inquiry whether Congress clearly resolved the issue. *Id.* at 842-43. As moonlighting is widespread, it is plain that the word "employee" cannot exclude concurrent employment generally.

Once that (obvious) step is taken, it is hard to see how one could exclude employment by a union as well as another employer except on grounds either of some implication from the structure of the Act or some powerful legislative history. But in fact closely related legislation, the Labor Management Relations Act, manifests a congressional assumption that an employee may be employed by a union and another entity. Although its § 302 generally prohibits payments from an employer to an employee of a union, it excepts from that ban payments made "to any . . . employee of a labor organization, who is also an employee . . . of such employer, as compensation for, or by reason of, his service as an employee of such employer". 29 U.S.C. §186(c)(1) (1988).[1] Willmar points to nothing in the legislative history that would overcome this implication.

The Supreme Court recently stated a presumption that a statutory use of the term "employee" should be taken to have its common law meaning unless Congress "clearly indicates otherwise", *Nationwide Mutual Insurance Co. v. Darden*, 112 S. Ct. 1344, 1349 (1992), observing wistfully that after each of two prominent decisions in which the Court ventured beyond the common law guidelines, one of them a decision construing the NLRA *(NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944)), Congress had "amended the statute so construed to demonstrate that the usual common-law principles were the keys to meaning", 112 S. Ct. at 1349. As the Court noted, the NLRA "defined 'employee' to mean (in relevant part) 'any employee'", *id.* at 1349 n.4, i.e., it failed to indicate rejection of the common law model.

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[1] This exception completely undermines Willmar's claim that §8(a)(2) of the NLRA, 29 U.S.C. §158(a)(2) (1988), forbidding employer financial support of a union, and § 302 of the Labor Management Relations Act, forbid the employment of someone situated as Hendrix is. So long as Willmar gets a day's work for a day's pay out of Hendrix, it violates neither provision.

Under common law principles "[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other." Restatement (Second) of Agency § 226 (1958); *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 324 (1974) (recognizing that under the common law a servant can have two masters in a variety of relations); *Dellums v. Powell*, 566 F.2d 216, 222 & n.22 (D.C. Cir. 1977) (same). Until such time as an employee "abandons" the non-union employer for the union employer, it is hard to see why he should be denied the protection of the Act.

Against this, Willmar presses the point that Hendrix's employment relation to the union would subject Willmar to intolerable risks of disloyalty. A similar concern played a large role in the Fourth Circuit's recent holding that a full-time union employee, who proposed to continue as such even if his application should be accepted by the proposed non-union employer, could not be an "employee" under § 2(3), *H.B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989). The court said that the "term [employee] plainly does not contemplate someone working for two different employers at the same time and for the same working hours", *id.* at 73. (It was stipulated in *Zachry* that the individual would remain employed and supervised by the union "even during the precise hours he was to work for Zachry." *Id.*) See also *NLRB v. Elias Brothers Big Boy, Inc.*, 327 F.2d 421 (6th Cir. 1964) (similar reading of "employee"); but see *NLRB v. Henlopen Manufacturing Co., Inc.*, 599 F.2d 26 (2d Cir. 1979) (rejecting *Elias* without explanation).

This risk of disloyalty is surely not to be discounted. Indeed, we are ready to assume *arguendo* that Willmar made out so powerful a case of likely disloyalty that the Board would have had to conclude that rejection of Hendrix's application *on that ground* would have been legitimate and not in violation of the anti-discrimination and anti-coercion provisions of the Act.

"Nothing in the Act prevents an employer from disciplining or discharging an employee for disloyalty". *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061,1064 (D.C. Cir. 1992). An employer may dismiss an employee for arson (or propensity to arson), but if the arsonist is also a union member and proves that the employer fired him for organizing activity, the employer may not evade the *Wright Line* rule by saying that arsonists are not "employees"; it must prove that it would have fired the arsonist even if he hadn't been engaged in union-related activities.

Willmar invokes two further specters. First, it suggests that there might be anomalies in Hendrix's participation in a vote at Willmar on union representation. See also *H. B. Zachry v. NLRB*, 886 F.2d at 74-75. But Hendrix's qualification as an "employee" is not the same as eligibility to vote; he could be included in a bargaining unit only if found to share the necessary community of interest with other workers. See, e.g., *NLRB v. Action Automotive, Inc.*, 469 U.S. 490 (1985) (employees related to owner/managers not permitted to vote). To the extent that Willmar's arguments have force, they can be raised at that stage. But the existence of that issue on the horizon is not in itself a reason to deny Hendrix the protection of the NLRA at the hiring stage.

Willmar also points to decisions such as *NLRB v. Babcock & Wilcox Co., 351 U.S.* 106 (1966), see also *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841(1992), carefully distinguishing between the right of union members who are employees to use employer property for their advocacy, and the much more limited rights of non-employees. We see no conflict. That Hendrix's employment would give him a better perch from which to propagandize is true, just as it would be true for any union zealot who got a job with Willmar. Willmar's reading of § 2(3) is quite unnecessary to prevent any anomaly on this score.

We hold, then, that the NLRB could reasonably determine that Hendrix or anyone else who is employed simultaneously by a union and a company is an "employee" under § 2(3) of the Act, leaving to another day the issue of when employment ties to a union establish such a risk of disloyalty that the (non-union) employer can reject or dismiss the union employee on that ground.

Accordingly, we deny Willmar's petition for review and grant the NLRB's cross-application for enforcement of its order.

So Ordered

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WILLMAR ELECTRIC SERVICE, INC.

AND

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 46

Case 19—CA—20137

MICHAEL C. HENDRIX, an Individual

Case 19—CA—20138

DECISION AND ORDER

On September 1, 1989, Administrative Law Judge Richard J. Boyce issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Parties filed a response. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as further explained below, and to adopt the recommended Order.

The sole issue remaining in dispute in this case is whether the judge correctly concluded that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Michael Hendrix, who was employed full time as an organizer for the Union at the time of his application for a job with the Respondent. In exceptions, the Respondent contends, *inter alia*, that it could lawfully refuse to hire Hendrix on the basis of his status as a paid union organizer because such an individual is not an employee within the meaning of Section 2(3) of the Act. For the reasons set forth below, we find no merit in this argument.

Michael Hendrix is a journeyman electrician. On June 23, 1988,[1] Hendrix began working as a full-time field organizer for the Union. During June and July, Hendrix contacted the Respondent about entering into an agreement with the Union for the Respondent's electrical subcontracting project at a J. C. Penney store under construction in Silverdale, Washington. For the remainder of the year, Hendrix had frequent conversations with the Respondent's officials about this subject.

Beginning on or about August 30 and continuing into January 1989, Hendrix also communicated on several occasions with the same officials about job prospects both for himself and for other local union members. On October 14, Hendrix delivered his own and another electrician's completed job applications to the Respondent's project foreman, Douglas Rose. These were the first local job applications received from outside the company. In subsequent communications with the Respondent's officials, Hendrix expressed his continuing interest in working for the Respondent, noting in particular the appeal of a jobsite close to his residence. On December 30, Hendrix telephoned Rose and asked if the Respondent was hiring and had considered his application. Rose stated he was hiring but had not considered Hendrix's application because "it's kind of hard to hire you when you're out there on the other side, picketing." (Hendrix had engaged in area standards picketing and handbilling protests at the Respondent's jobsite from November 30 until December 15.) Hendrix told Rose to consider him seriously for a job, that obtaining employment to carry out field organizing responsibilities is customary activity for field organizers, and that Hendrix would be organizing during lunch and after work. The Respondent never offered Hendrix a job.

Although not mentioned in the judge's decision, Hendrix testified that union officials knew about his application for

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[1] All dates are in 1988, unless otherwise indicated.

employment by the Respondent, but that he received no direction from the Union to seek employment with the Respondent. Hendrix testified that seeking employment was normal activity for field organizers. In his testimonial opinion, he would have to take a leave of absence from employment with the Union if hired by the Respondent, but he would retain his title as field organizer. He also testified that he would be paid only by the Respondent for work performed for it. He did not know whether the Union would reimburse him for any shortfall in compensation, but he was willing to take a reduction in pay to work for the Respondent.

As set forth fully in the judge's decision, he found that during December and January 1989 the Respondent manifested an antiunion hiring policy through the violation of Section 8(a)(3) in refusing to hire applicant Haugen and through several antiunion statements made by Rose in violation of Section 8(a)(1). There are no exceptions to these findings. The judge also concluded that the Respondent violated Section 8(a)(3) by refusing to hire Hendrix because of his union activities. In the discussion supporting this conclusion, the judge stated, "That Hendrix was a paid, fulltime union organizer, intent upon organizing Respondent's employees, is of no moment." In support of this statement, the judge cited *H. B. Zachry Co.*, 289 NLRB 838 (1989), in which the Board found an unlawful refusal to hire a paid, full-time union organizer. In its exceptions, the Respondent supports its argument that paid full-time union organizer Hendrix is not a protected employee within the meaning of Section 2(3) of the Act by reference to the opinion denying enforcement of the Board's Order in *H. B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989), a decision that issued after the judge's decision in this case.

After careful review of the Fourth Circuit's analysis in *Zachry*, we adhere to the Board's holding in that case that individuals who are full-time paid union organizers while ap-

plying for a job are protected Section 2(3) employees who cannot be discriminatorily denied employment simply on the basis of that union activity or status.[2] In any event, we find that this case is factually distinguishable from *Zachry* on points critical to the Fourth Circuit's determination that the paid union organizer there should be excluded from the statutory definition of employee.

In *Zachry*, the court held that an employer could lawfully reject a job applicant who would be simultaneously paid and supervised by the union. In support of this holding, the court emphasized stipulated evidence that Edwards, the paid union organizer/job applicant at issue, planned to remain concurrently employed and supervised by the union during his hours of work for Zachry and would have been performing services for Zachry only because directed to do so by the union. In addition, the union would have paid Edwards for the difference between his salary at Zachry and his full union salary, for his health, life insurance, and pension benefits, and for daily transportation expenses and living expenses related to the Zachry job.

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[2] It is a well-established principle of Board law that the Sec. 2(3) definition of employee includes applicants for employment. Accordingly, prospective employee applicants are entitled to the same statutory protection against antiunion discrimination as current employees, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1940); and paid union organizers are entitled to the same protected Sec. 2(3) status as other applicants, *Oak Apparel*, 218 NLRB 701 (1975). An employer may, however, lawfully refuse to hire a statutorily protected employee applicant, including a paid union organizer, on the basis of a *nondiscriminatory* policy against hiring any individual who, for example, seeks only temporary employment, applies while working for another employer, or intends to work simultaneously for more than one employer. The Respondent here did not prove that it refused to hire Hendrix pursuant to any such nondiscriminatory policy. In this regard, we reject the Respondent's contention that it did not hire Hendrix because he was only interested in a foreman's job for the reasons discussed by the judge.

Here, by contrast, Hendrix's uncontroverted testimony is that: he received no specific direction from the Union to seek employment with the Respondent; if hired by the Respondent, he would have to take a leave of absence from employment by the Union; he would limit any organizational activity to personal time at lunch and after work; he would not receive direction from the Union during hours of work for the Respondent; he was willing to take a reduction in pay to work for the Respondent; and he did not know whether the Union would reimburse him for any shortfall in compensation. In sum, although Hendrix clearly intended to serve the Union's organizational interests as an employee of the Respondent, there is no affirmative evidence that Hendrix planned to remain concurrently employed, directed, or compensated by the Union for time spent working for the Respondent. Furthermore, there is no evidence that Hendrix would terminate his job with the Respondent at the end of any organizational campaign rather than at the completion of a job project conveniently close to his home.

Although we adhere to the Board precedent set in *Zachry* and cases cited therein, we believe that the aforementioned circumstances in this case indicate that Hendrix would not have been "[an employee] working for two different employers at the same time and for the same working hours."[3] Therefore, his job application did not raise the same concerns about divided employment loyalties and interests which underlay the Fourth Circuit's conclusion in *Zachry* that paid organizer Edwards was not entitled to antidiscrimination protection as an employee within the meaning of Section 2(3) of the Act.

Based on the foregoing, we find that Hendrix was an employee within the meaning of Section 2(3). In agreement with the judge's analysis of the Respondent's motivation for refusing to hire Hendrix, we affirm the finding that this refusal violated Section 8(a)(3) and (1) of the Act.

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[3] *H. B. Zachry Co. v. NLRB*, supra at 73.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Willmar Electric Service, Inc., Silverdale, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Order. Dated, Washington, D.C. May 31, 1991

James M. Stephens, Chairman

Mary Miller Cracraft, Member

Dennis M. Devaney, Member

NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

WILLMAR ELECTRIC SERVICE, INC.

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 46

Case 19—CA—20137

and

MICHAEL C. HENDRIX, an Individual

Case 19—CA—20138

Max Hochandel Atty., of Seattle, WA,
for the General Counsel.

Judd Lees, Atty. of *Williams, Kastner, & Gibbs*, Bellevue, WA,
for Respondent.

John Burns, Atty., of *Hafer, Price, Rhinehart & Schwerin*, of Seattle, WA,
for the Union.

DECISION

RICHARD J. BOYCE, Administrative Law Judge

I. Statement of the Case

This matter was tried in Seattle, Washington, on April 6 and 7, 1989. The consolidated complaint, based on charges filed by International Brotherhood of Electrical Workers, Local Union No. 46 ("Union") and Michael C. Hendrix, issued on

February 22, 1989, and alleges that Willmar Electric Service, Inc., ("Respondent") violated Section 8(a)(3) and (1) of the National Labor Relations Act ("Act") by failing to employ Hendrix and Allen Haugen for its job on a J.C. Penney store in Silverdale, Washington, in late 1988.[1]

The complaint also alleges that Respondent, by its project foreman, Douglas Rose, independently violated Section 8(a)(1) in seven instances in late 1988 and early 1989: by asking a job applicant in November if he was "connected with a union," by subsequently telling an employee there was "no way [he] would hire any union people," by asking an applicant on about December 28 if his previous employers "were union contractors," by telling an applicant on about December 30 that it would be "hard to hire" him and that Rose "would not do so" because the applicant had picketed at the jobsite, by asking an employee on about January 9 if he knew their "little union buddy" Hendrix, by telling an employee on about January 16 that a no-applicants sign at the jobsite "was intended only for applicants affiliated with a union," and by asking an employee on about February 7 "if he had been contacted by an agent of the [National Labor Relations] Board."

II. Jurisdiction, Labor Organization

Respondent is a multi-state electrical contractor headquartered in Willmar, Minnesota. The complaint alleges, the answer admits, and I conclude that it is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

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[1] Section 8(a)(3) forbids an employer from "discriminating in regard to hire or tenure of employment to encourage or discourage membership in any labor organization." Section 8(a)(1) prohibits an employer from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in Section 7" of the Act. Section 7 guarantees employees "the right to self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

The parties also agree and I conclude that the Union is a labor organization within Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Evidence

Respondent is the electrical subcontractor on a J.C. Penney store under construction in the Silverdale Mall, Silverdale, Washington. Douglas Rose, a journeyman electrician, is its project foreman. He reports to Bryan Johnson, regional projects manager, who is located in Aurora, Colorado, and to Johnson's superior, Timothy Imdieke, operations manager, who works out of the home office in Willmar. Imdieke testified that, while he and Johnson "work together with" Rose as concerns hiring for the Silverdale project, Rose is empowered to hire independently within prescribed manpower limits.[2]

Respondent contracted for the job in the early summer of 1988; and Rose, unassisted, started doing preliminary work on the site in August. Rose hired his son, Todd, as an apprentice in early September. Jack Hitt, a journeyman recently on another of Respondent's projects, joined the crew in mid-October. Rose's affidavit states that Hitt was "responsible for orienting the newer employees to the work" as later hirings occurred. The complement grew to ten on January 3 and 4, with the addition of three journeymen and four apprentices. All seven came from the surrounding area and none had worked for Respondent before.

Respondent thereafter continued to hire apprentices or trainees from the surrounding area. The several journeymen it later hired had been on its payroll before, however, and came from afar.

Imdieke testified that Respondent has been party to a union contract only once that he knows of, on a 1984 project. Asked

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[2] Mirroring this, Rose states in his affidavit that he does "all the reviewing and final approval of applications locally."

if Respondent ever hired union members, Imdieke testified, "That's a tough one"; then added, "I basically wouldn't know, . . . but at times [employees] have mentioned that they belong to an organization."[3] Rose testified that he does not have the "slightest idea" if the Silverdale payroll includes members, nor does he "really care." The record contains no evidence that any of those hired for that project was then a member.

Hendrix is a journeyman electrician. He has been a full-time field organizer for the Union since June 23, 1988, having taken a leave-of-absence from his position with an electrical contractor.

In late June, upon learning that Respondent would be the electrical subcontractor on the Penney project, Hendrix called Imdieke, asking about Respondent's manpower needs. Imdieke said he had not "looked at" the situation yet, but probably would be getting to it "in a couple weeks."Hendrix called again in mid-July, expressing an interest "in sitting down and talking. . . about a contract"for the project. Imdieke told him to send a copy of the Union's standard contract, and that he would "get with"his boss about it.

Hendrix thereupon mailed Imdieke a rough draft of the Union's newly ratified contract. The two then had a telephone conversation on July 25, in which Imdieke said that Respondent was "not interested in signing any kind of agreement, but . . . would be interested in looking at some of the [Union's] people." That was followed by a letter from Hendrix to Imdieke, dated July 27, in which he proposed "a one-project agreement that will not bind you to any other projects in the country."

Hendrix first met Rose on a visit to the jobsite in August 30. Introducing himself as a union organizer and tendering his business card, he asked Rose about job prospects and, as he had

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[3] Thus, Imdieke went on, an employee in Danville, Virginia, "mentioned he belonged to a local . . . in the last couple of months."

with Imdieke, broached the idea of Respondent's signing a project agreement. Rose responded that "things were really slow"on the project, the implication being that those matters were of no immediate concern, and the conversation turned to hunting and fishing.

In the aftermath of this first encounter with Hendrix, Rose entered in his daily job log:

> IBEW labor organizer came to jobsite, seems to have vast knowledge of [Respondent]. Wants us to sign a labor agreement, said he has talked to Tim, etc. Mostly small talk but what he comes out with gives me the impression that they have targeted [Respondent] for the infiltration of union members.

Rose's log reveals that he and Hendrix had a second conversation on September 1, with Hendrix saying he would like to have a job application form before Rose began hiring. Hendrix added that he was not working in the trade, according to the log, and summarized his qualifications as an electrician. Rose responded that he had no applications. Following that conversation, still tracking the log, Rose "discussed the union issue" with Imdieke and Johnson, and they "decided to not give out applications until all angles have been checked." Asked what he meant by "all angles," Rose testified: "You'll have to ask them [Imdieke and Johnson]. . . . That was the reply I got when I talked to Tim."

On September 2, Rose and Johnson resumed the previous day's conversation. Rose's log states: "Discussed hiring policies concerning union help, discrimination." The record provides no additional information concerning the exchange. Rose testified that he also spoke with the Associated Builders and Contractors, to which Respondent belongs, at about this time; and was told, in answer to his queries about the Union, that it is "bad news."

Hendrix continued to call on Rose with some regularity. In the early visits, at least, they chatted congenially and at length about hunting and fishing, although Hendrix generally interjected the subjects of an agreement and hiring, as well. According to Rose's affidavit, his customary rejoinder, when Hendrix raised those subjects, was that Respondent "went through the State for applicants" and that it was "nonunion and wanted to stay that way."

On September 7, Hendrix asked Rose for an application. Rose replied that he had none; that he thought the home office "was going to do the hiring" and Hendrix therefore should "contact" it; and that Respondent "probably" would not need help until about December. Hendrix, in his role as field organizer, consequently wrote Imdieke on September 9, stating:

> I have been in contact with your foreman . . . in Silverdale, Washington. He has indicated to me that your office would be doing the hiring in Willmar.
>
> I am still interested in signing a project agreement with your Company and offering our qualified Journeymen to your Company. Please consider this offer.
>
> Doug [Rose] said that he did not have any employment applications on site and that I should contact you at your office. Would you please send me one of your application. [sic]

First conferring with Respondent's labor attorney in Minneapolis, Imdieke mailed Hendrix an application on about September 16.

In late September, Rose told Hendrix that he foresaw a crew of "somewhere around 10 to 15" electricians, and that he was "going to pursue" local hiring.

On October 14, Hendrix delivered two completed applications to Rose, one being his own. Rose testified that these were the first he had received "except for people within the company."

He and Hendrix had a "very brief" attendant conversation, in which Hendrix "verified"his work experience and stated, as he was to do several times, that a job with Respondent especially appealed to him because "it's right over the hill from [his] house."

Where his application asked for "Position Desired," Hendrix entered: "Journeyman-Foreman Electrician." Rose inferred from this, so he testified, that Hendrix was interested only in being a foreman. Hendrix testified that he did not tell Rose this, however, and the record contains no intimation that Rose questioned him on the point. [4]

Rose sent Hendrix's application, but not the other one, to Imdieke. In his covering note, he stated:

> Mike Hendrix came in today and left two applications. Please note the date of the application. [5] In reading over his application I've noticed he is applying for a foreman position. He also states he has had a strained back. Also, you'll notice he is presently working for 21.00.
>
> The way I see it, he is already working, has a questionable back, and if he was hired as a foreman, I'd have nothing to do. My opinion is WES should not hire him at this time, however, you may have a position for him up there. I'll keep in touch.

Upon receiving the application, Imdieke again conferred with Minneapolis counsel. He testified that he then "talked briefly" with Rose, who remarked that Hendrix was seeking his

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[4] Hendrix testified that he would have taken "whatever they had"; that he "would have went to work as a grunt for them."

[5] Hendrix entered two dates on his application: September 28 at the top and October 10 on the signature line. He testified that he began filling it out on the 28th and finished on the 10th.

foreman's job; and that he, Imdieke, rejoined: "Well, that's not my policy. He wouldn't be foreman."[6]

On November 7, journeyman Newell Casavant submitted an application. He testified that Rose mentioned in the accompanying conversation, that Hendrix had "come by" and that Respondent "might be going union"; and asked Casavant "how [he] felt about that." Casavant assertedly replied that "it didn't bother" him.

Another Journeyman, Jerry Jones, applied on November 17. The following week, he testified, he told Rose he had gained his experience "through the Union," prompting Rose to ask if he was "still affiliated with the Union" and how he felt "about working for a nonunion shop." Jones replied, as he recalled, that he had "hard feelings against" the Union and was no longer a member; and Rose remarked, "Well, you don't have to worry, because Willmar Electric is nonunion and it intends on staying nonunion."

Rose admittedly asked Jones how he felt about working for a nonunion shop. He explained:

> I asked a lot of people that. I ask that because of the possibility of picketing, and I asked people a lot of times, "Do you have any problems crossing the picket line, does that bother?"... There are several questions like that, just general stuff.

Jones further testified that Rose told him, in November, that he "liked to hire locally because you could give the economy a boost," and that he intended to hire from 16 to 20 people.

On November 30, Hendrix and two others began picketing Respondent at the jobsite. The signs stated: "Willmar Electric,

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[6] Imdieke testified that his "general practice and a good practice" regarding the hiring of foremen is: "It's got to be somebody I know and somebody that came up through the ranks."

Substandard Wages." Picketing continued until December 15. Hendrix estimated that he participated "the majority of the time." The picketing was preceded by letters to Respondent and the general contractor, on union stationery and signed by Hendrix, detailing the inadequacy of Respondent's wages and benefits relative to area standards, and informing them of the impending picketing. Hendrix and others distributed leaflets at the site, as well.

On December 14, as revealed by the records of the Washington State Employment Service, Rose advised its Bremerton office that Respondent "need[ed] journeymen and other experienced electricians." Rose's affidavit states that, while he did not specify how many employees he was seeking, he "was actually looking for . . . 5 journeymen and 4 or 5 apprentices on this job." Then, on December 27, as disclosed by Employment Service records, Rose told it that Respondent had "all the inexperienced help needed," but still invited the referral of "journeymen and other experienced electricians." This stood until January 13, when Rose instructed the Employment Service that Respondent's needs had been met. These records and his affidavit to the contrary, Rose testified that he was "mostly looking for apprentices" when he placed the December 14 order, because he "had made up [his] mind who [he] was going to be putting on as a journeyman already"; and that he was not seeking journeymen, in late December inasmuch as he "had made a decision to put on" Casavant, Jones, and one Ray Gauthier "prior to" that.

Haugen, a journeyman electrician and a member of the Union, entered the picture on December 28. Having obtained an introduction card from, the Employment Service, he called Rose that afternoon, requesting an interview. Haugen testified that Rose asked if he was a journeyman or a trainee; exclaimed, "Oh, great!" upon Haugen's saying he was the former; and urged Haugen to come to the site "right away." Rose also stated, per

Haugen, that Respondent "had all the trainees [it] needed," but that he still "wanted" journeymen.[7] Rose concedes that Haugen "probably" identified himself as a journeyman; and that he in turn said, "Good," and invited Haugen to come to the site. He denies telling Haugen, however, that he "need[ed] journeymen."

Haugen arrived at the site and filled out an application a few minutes later. He testified that others also were filling out applications; that he heard Rose ask another, unidentified person, "How many of these guys do you want?"; and that the other person replied, "As many as you can get."

When Haugen handed his application to Rose, Rose asked about his work experience. Haugen answered that he had had "a lot of experience working at the mall," including nine months during its construction and in the Sears and Bon Marche stores. Rose then asked if Haugen's past employers were unionized, according to Haugen, and he said they were. Rose presently brought the interview to an end, Haugen testified, by saying the application "look[ed] good," and that he would "make a few phone calls and . . . get back to" Haugen.

Rose would have it, on the other hand, that he said Respondent "didn't need any more journeyman electricians," that he had "made up [his] mind who [he] was going to hire already," and that he "would put [Haugen's] application in the file."[8] Asked if he inquired about Haugen's union status, Rose answered, unresponsively, that he was "very busy that day," and

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[7] Haugen later testified that either Rose or the Employment Service told him this, and that he "believe[d] it was [in] the phone conversation with Mr. Rose."

[8] Rose states in his affidavit that, before Haugen's arrival on the 28th, he "had already called the State to tell them [he] was full earlier that day." He acknowledged in his live testimony that he could not recall that.

that his exchange with Haugen was "just a quick where-have-you-been-working, are-you-from-the-area type of thing."[9]

On December 30, Hendrix called Rose, asking if he was hiring; and, by Hendrix's account, this exchange ensued:

Rose: "Yes, we're hiring right now, looking for guys."

Hendrix: "Have you considered my application?"

Rose: "Which one?"

Hendrix: "Mine."

Rose: "Oh, not really."

Hendrix: "Why not?"

Rose: "Well, it's kind of hard to hire you when you're out there on the other side, picketing."

Hendrix: "I'm not picketing anymore."

Rose: "You were picketing."

Hendrix: "Well, I'm not anymore."

Rose did not explicitly deny any of the foregoing in his live testimony. But, asked if he *recalled* telling Hendrix "he would not be hired because he picketed the company," Rose replied, "No, I do not." In his affidavit, on the other hand, he denies telling Hendrix "that [he] could not hire him because he was picketing and/or was on the other side."

The remainder of the conversation, by more or less mutual agreement, consisted of Hendrix's saying he was experienced in the "kind of work" Respondent was doing and would do "a good job"; that all his past employers "would give [him] an A-1 rating"; and that he had been "in the industry for 10 years."

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[9] Rose's affidavit asserts that he "did not ask [Haugen] any questions about his union affiliation," but that he "did tell him it was a nonunion job." Haugen had asked if it was "a union job," according to the affidavit, and offered that his last job "was union."

Hendrix also told Rose that, if hired, he "would be organizing during the lunch hour." He then suggested that Rose "wouldn't like that," and Rose agreed. Hendrix testified that to "obtain employment . . . to carry out . . . field organizing responsibilities" is "normal activity for field organizers."[10] As the conversation wound down, Rose said he "hadn't looked at" Hendrix's application. Hendrix urged that he "seriously take a look at it and consider [him] for a job," and that he "let [him] know one way or the other."

Among the entries in Rose's log for the 30th is this:

> Mike Hendrix said he'd like to come to work with our understanding that he would be trying to organize the crew during lunch and after work.

During the first week of January, journeyman Joseph Lesh gave Rose his application. Lesh testified that Rose told him he "would be hiring" and would "get back to" Lesh. [11]

On January 4, not having heard from Rose, Haugen telephoned the job. Rose's wife, Sandra, employed as Respondent's secretary, answered, saying Rose was busy and to call back in half an hour. Sandra testified that she then spoke to her husband, who told her he was no longer hiring. When Haugen called back, Sandra said Respondent had "hired all the people [it was] going to hire," but would keep his application on file. Haugen, voicing the suspicion that he was not hired because he is "union,"asked to speak to Rose, saying he wanted

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[10] Hendrix opined that if hired by Respondent, he would retain his title as field organizer, but that his pay "would stop from the IBEW." He did not know if the Union would make up the difference should working for Respondent entail a pay cut.

[11] Lesh never did hear from Rose. He testified that a past employer listed on his application, Evergreen Electric, is "a union outfit."

to "explain some things." Sandra said Rose was too busy to come to the phone, terminating the conversation.

Apparently on the 4th, as well, Rose received a "cluster" of six applications sent by Hendrix. [12] One had been filled out and signed by journeyman Dwayne Macomber; the others had been filled out and signed by Hendrix on behalf of people on the Union's out-of-work list from, whom, he had obtained permission. On January 6, Macomber called Rose about the status of his application. Rose "expressed ignorance of it," as Macomber recalled, but said he would check and call back. [13] Rose called the next day, reporting to Macomber that he had "only just received" the application, that "all positions were filled," and that he would keep the application on file.

By letter dated January 6, Rose returned the six applications to Hendrix. The letter states, variously, that Respondent's practice" is to "hire employees on an individual basis or, when necessary, through a local job service," and not "through any other organizations, recruiters, etc."; that those "seeking employment in the electrical field should apply in writing a letter, along with their resume," to the home office; and that, "at the present time, we have filled our employment needs for this project."

Macomber testified that he called Rose again a couple weeks later, and that Rose said the six applications "were unacceptable," explaining that Respondent "couldn't accept applications from a labor organization." Macomber asked if Respondent had rejected his application because of his union

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[12] The record is unsettled regarding the date of receipt. Hendrix's cover letter is dated December 21, Rose's affidavit states that he received the applications on about the 27th, and Rose's log states that he got them on the 4th. The log presumably is the most reliable.

[13] Upon his receipt of them, Rose sent the six applications to Respondent's Minneapolis counsel.

membership, he recounted, and Rose answered, no, that Respondent had "union people on the job."

Rose did not address these conversations with any specificity in his testimony. Asked generally if he ever said "there was no way [he] would hire any union people," he testified:

> I don't believe I made that statement at all. That would be a silly thing for me to say. We joke around a lot. I just would not say that, no.

On January 9, a Monday, Rose asked apprentice employee Lafayette (Dean) Brooks, if he knew Hendrix. Hendrix had passed out leaflets at the site the previous Friday, engaging Brooks in a several-minute conversation as Brooks left the job. Not knowing Hendrix by name, Brooks asked Rose whom, he was referring to. Rose answered that Hendrix was "our little union buddy." Brooks then affirmed that he had spoken with Hendrix. Rose testified that he called Hendrix his "little union buddy on several occasions" in conversation with employees.

On January 14, Haugen called again, this time speaking to Rose. He stated that he did not intend "to cause any union problems at all"; that "a union person can do a high-quality job and not cause any problems." Rose shot back that "being a union member or not ha[d] no bearing" on his hiring decisions; that Haugen was "not the only one that had called and said" the contrary; and that he was "tired of hearing that."[14] Rose added that he would not be hiring again "till June or July."

In mid-January, Jones, one of the three journeymen to start on January 3-4, told Todd Rose that he had a friend who would make a good apprentice for Respondent, but that he was discouraged from pursing the matter because of the recently-posted sign that Respondent was not accepting applications. Todd came

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[14] The State Employment Service questioned Respondent whether it was hiring around union members.

back: "[T]hat's just for the Union. If he's any good, just tell my father, and they'll just bypass that."

Soon thereafter, Rose asked Jones if he knew of a good prospect. Jones answered, "Yes, but your sign says that you're not taking applications." Rose stated, by Jones' uncontradicted account, that the sign was "just for the Union's benefit." Jones' friend, Steve Medlock, submitted an application on January 20 and was promptly hired.

Rose admittedly continued to take applications despite the sign. He denies, however, that the sign was calculated to thin out union-member applicants. The reason for it, he testified, was that he "did not have time for a lot of people coming in and out" because "there were some changes in J.C. Penney's plans that needed to be addressed immediately."

On January 17, Rose fired Dean Brooks. Jones testified that Todd Rose had commented, the day before: "Well, we found out who the union rat is. It's a guy named Dean Brooks." Todd went on, according to Jones, that Respondent would remain nonunion "by not hiring union people"; that his dad "puts a check on people somehow" and "wouldn't hire" anyone known to be "for the Union." Jones' recital continued that, after Brooks' termination, Todd remarked that Respondent had "killed two birds with one stone" inasmuch as Brooks "was not a good worker" and was "a union sympathizer." The record contains no evidence that Todd Rose performed supervisory or managerial functions for Respondent. He lived and often commuted to the job with his father, however; and Rose conceded--"sure"--that he talked to Todd about the union situation on the project.

On February 7, Jones testified, Rose said to him, that an agent of the NLRB had called Casavant; then asked if the agent had called him. Rose, averring that Casavant had "volunteered" to him that he had been called by a Board agent, admitted that he later conversed with Jones and other employees whether they had been called. Rose termed it "just common jobsite banter."

The Board agent was investigating the charges underlying the complaint herein.

Respondent offered neither Hendrix nor Haugen a job. Asked why he did not make an offer to Hendrix, Rose testified:

> I didn't think he was serious at all. I thought he was very serious about maybe putting some people from his organization on at work, but I didn't think that he was serious at all in his venture to go to work for Willmar Electric.

Rose testified that he did not take Hendrix's application seriously "because he was full-time working, expressed that he enjoyed his job very much, why come to work for me?" Two of the journeymen who began on January 3-4, Jones and Ray Gauthier, had their own electrical-contracting businesses, however, and were hired with the understanding that they would be leaving if their businesses picked up. Gauthier accordingly did leave in late January, to meet the needs of his business; then returned, on a part-time basis, in March. Attempting to distinguish the Hendrix situation from those of Gauthier and Jones, Rose testified, "It had to do with he was very happy with what he was doing and had no intention of quitting . . . and coming to work." Rose concededly "didn't even consider" asking Hendrix if he would quit his union job should Respondent hire him.

Imdieke, citing Hendrix's position with the Union and Respondent's stated perception that he was interested only in being a foreman, likewise testified that he "couldn't take" Hendrix's application "seriously."

Rose testified that he did not hire Haugen because:

> At that time, I had made a decision . . . to hire Ray Gauthier or Jerry Jones and Newell Casavant. And, also, at that time there was rumblings that there would be some transfers coming up [from Respondent's

other projects]. Mountain Home [Idaho] was running out of work. But, right at that very specific time, I needed ten people.

Casavant, Gauthier, and Jones all "walked in"; that is, they applied independently of the State Employment Service, the Union, or any other referral source. Rose testified that he told Casavant "on the first of December" that he could have a job; that he made similar commitments to Gauthier and Jones on December 15 and 27, respectively; and that he considered the three hired as of those times. Respondent's records and Rose's affidavit state, however, that Casavant was hired on January 4, Gauthier on December 30, and Jones on December 28.

Casavant testified that, while Rose told him in "the first part of December" that he "probably" could start on January 3 or 4, Rose did not confirm, that until the 3rd, when he told Casavant to report the next day. Casavant further testified that he quit his former job on December 23 because he was "tired" of it and "thought [he] had a pretty good chance of getting this job" with Respondent. Jones testified that Rose told him on December 27 or 28 to "come in and fill out some paperwork"; and that he complied on the 28th, at which time Rose directed him to report on the 3rd. Gauthier did not testify.

As previously noted, Respondent hired only former employees to meet its journeyman needs after January 3-4. The first of these was Junior Sam, who began on January 15. He was followed on February 6 by Willard King, on February 15 by Mike Froseth, and on February 16 by Jim Wirt. They had been on projects recently completed in either Mountain Home, Idaho, or Fallon, Nevada.

Rose testified, concerning the staffing of jobs: "I usually call the unemployment office. That's a standard procedure to pick up help from."Another "standard procedure," he testified, is to "talk to different people to see if there is, within the company, . . . people who are going to be coming in" from other

projects. His affidavit states that past employees "would be given first preference if they want to move here on their own." But Rose admittedly did not follow this latter procedure incidental to assembling the early January crew.

Imdieke testified that Respondent "prefer[s] transfers" over strangers; that his "concern" as projects are "shutting down," is to "keep them working"; and, with that in mind, that he discusses staffing with Johnson several times a week--what is "coming up," what is "shutting down," "where people are available, where they aren't."[15] Asked why Respondent had hired no former employees for the Silverdale project before Sam, Imdieke testified that "you have to have the need and you have to have the availability," and that "a little of both" was lacking earlier.

In mid-February, Respondent increased its employees' workweek to include eight hours of overtime. Jones testified that Rose explained:

> [W]e're not going to hire any more people. We're going to try and do it the way that we've been going. We like the crew and we like what's going on and . . . we're just going to start going on overtime.

Rose testified that the reason for the change was "to eliminate peaks and valleys in employment," and that he, Imdieke, and John Chapin, Respondent's president, participated in the underlying deliberations.

Rose previously had told Jones that Respondent "does not practice, as a rule, overtime," and would be unlikely to do so at Silverdale "unless Penney's picks up the tab." Rose acknowledged that Penney's "did not volunteer at any time to pick up

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[15] Even so, according to Imdieke, Respondent generally does not keep electricians on the payroll between projects. The weight of evidence indicates that the so-called transferees are treated as new hires at the next project. Respondent does not pay their moving expenses.

any overtime," and that "it's a known fact that overtime does not pay."

B. Conclusions and Reasons

1. The Alleged Independent Violations of 8(a)(1)

a) That Rose asked an applicant, in November, if he was "connected with a union," and

b) said there was "no way [he] would hire any union people."

Crediting Jones, he told Rose in late November that he had gained his experience "through the Union," prompting Rose to ask if he was "still affiliated with the Union" and how he felt "about working for a nonunion shop." Jones replied that he had "hard feelings against" the Union and no longer was a member, to which Rose remarked, "Well, you don't have to worry, because Willmar Electric is nonunion and it intends on staying nonunion."[16]

The Board decreed in *Rossmore House*[17] that the test for determining the legality of an interrogation is "whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act."[18] Since *Rossmore House*, the Board has reiterated its long-held position "that questions concerning union preference, in the context of job application interviews, are inherently coercive and unlawful, even when the applicant is hired."[19] The

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[16] Rose admittedly asked Jones how he felt about working for a nonunion shop, and did not disavow the other remarks attributed to him by Jones.

[17] 269 NLRB 1176 (1984).

[18] *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1217 (1985), explaining *Rossmore House*.

[19] *Gilberton Coal Company*, 291 NLRB No. 50, sl. op. 13-14 (1988). See also, *Lassen Community Hospital*, 278 NLRB 370, 374 (1986).

conversation in which the subject questions were asked, occurring a few days after Jones had left off his application and before he was hired, was in the nature of a job interview. Rose therefore violated 8(a)(1) as alleged by asking those questions.

Further, by stating to Jones Respondent's resolve to stay nonunion, Rose necessarily conveyed the impression that an applicant's being openly prounion not only would be pointless, but would prejudice his job prospects. So doing, he additionally violated 8(a)(1) substantially as alleged.[20]

c) That Rose asked an applicant, on about December 28, if his Previous employers "were union contractors."

Crediting Haugen, Rose asked him, when he turned in his application on December 28, if his past employers were unionized.[21] This was a thinly veiled inquiry into Haugen's union feelings; and, occurring in the context of a job interview, was inherently coercive in violation of 8(a)(1).[22]

d) That Rose told an applicant, on about December 30, that it would be "hard to hire" him, and that Rose "would not do so," because the applicant had picketed the jobsite.

Crediting Hendrix, Rose told him during a telephone conversation on December 30 that he had not "considered"

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[20] *L.W. Le Fort Company*, 290 NLRB No. 45, sl. op. 1-2 (1988); *Big Star No. 185*, 258 NLRB 300 (1981); *Love's Barbecue Restaurant*, 245 NLRB 78, 80, 83 (1979).

[21] Instead of refuting Haugen, Rose testified unresponsively when asked if he had inquired about Haugen's union status. The denial in his affidavit does not offset Haugen's convincing testimony on the point.

[22] See fn. 19, *supra*, and accompanying text.

[23] Hendrix's testimony in this regard was altogether convincing. Beyond that, Rose did not enter an explicit denial, testifying only that he could not *recall* saying Hendrix "would not be hired because he picketed." The explicit denial in his affidavit, standing alone, deserves little credence.

Hendrix's application because "it's kind of hard to hire you when you're out there on the other side, picketing."[23]

Hendrix, when picketing to protest Respondent's wage and benefit levels, was an "employee" within Section 2(3) of the Act, engaged in an activity protected by Section 7.[24] Rose's remarks, by inherently tending to restrain Hendrix from engaging in that and similar activities, violated 8(a)(1) as alleged. [25]

e) That Rose asked an employee, on January 9, if he knew their "little union buddy"Hendrix.

Crediting the uncontroverted testimony of then-employee Lafayette (Dean) Brooks, Rose asked him on January 9 if he knew Hendrix. Brooks, not knowing Hendrix by name, asked who that was. Rose answered, "Our little union buddy."Hendrix had engaged Brooks in conversation the previous workday, while handbilling at the site.

Brooks reasonably could have inferred (as do I) that Rose's purposes in asking the question were to apprise him that his *tete-a-tete* with Hendrix had not gone unnoticed and to elicit information indicative of Brooks' union sympathies. The record contains no evidence that Brooks was openly prounion, whereas Respondent's antipathy to the Union was manifest. I therefore conclude, applying the totality-of-circumstances test mandated by *Rossmore House*, that Rose's question bore a restraining and coercive impact in violation of 8(a)(1).

f) That Rose told an employee, on about January 16, that a no applicants sign "was intended only for applicants affiliated with a union."

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[24] That he was picketing in the course of his employment with the Union makes no difference. *H.B. Zachry Company* 289 NLRB No. 117, sl. op. (JD) 4 (1988).

[25] *E.g., California Cooperative Creamery*, 290 NLRB No. 46 (1988); *Haco Engineering Company*, 265 NLRB 27 (1982).

Crediting Jones' uncontroverted testimony, Rose asked him, in mid-January if he knew someone Respondent might hire. Jones answered, "Yes, but your sign says that you're not taking applications." Rose rejoined that the sign was "just for the Union's benefit."[26]

By thus declaring Respondent's aversion to union-connected applicants, Rose violated 8(a)(1) as alleged.

g) That Rose asked an employee, on about February 7, "if he had been contacted by an agent of the Board."

Again crediting Jones, Rose told him on February 7 that an NLRB agent had called a coworker, Casavant; then asked Jones if the agent had called him.[27]

Interrogations of this sort, even under the guise of "common jobsite banter,"[28] tend to dampen employee cooperation with Board investigations unless accompanied by assurances against retribution. They consequently work to diminish employee rights under the Act. Accordingly, Rose's question violated 8(a)(1) as alleged.[29]

2. The Alleged Violations of 8(a)(3) and (1)

a) Guiding Principles

The Board stated in *Wright Line*:

[W]e shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of

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[26] While testifying that the sign was not calculated to thin out union-member applicants, Rose did not deny making this remark. Jones was altogether convincing in any event.

[27] Rose in effect admitted doing this.

[28] Rose's depiction.

[29] *Scotto's IGA*, 249 NLRB 909 (1980). The Board there affirmed the Administrative Law Judge's finding of a violation on facts similar to the present. See also, *Bohemia, Inc.*, 266 NLRB 761 (1983).

Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct.[30]

b) Hendrix

I conclude that the General Counsel has made the requisite *prima facie* showing that Respondent's failure to hire Hendrix violated 8(a)(3) and (1).[31] My reasons for this conclusion are:

1. Hendrix quite obviously is a competent journeyman, and his application preceded those of the local-area journeymen who were hired.

2. Respondent apparently has a policy against hiring known union members. The record contains no evidence that any of those hired for the project in question was a member; Rose pointedly extracted information from applicants about their membership and sympathies, presumably as a winnowing tool; and Imdieke's initial response, when asked if Respondent ever hired union members, was, "That's a tough one." Even more revealing, Rose told Jones that the no-applicants sign was "just for the Union's benefit," and he advised Macomber that Respondent "couldn't accept applications from a labor organization,"[32]

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[30] 251 NLRB 1083, 1089 (1980) This formulation received Supreme Court approval in *NLRB v. Transportation Management Corp.*, 464 U.S. 393 (1983).

[31] That Hendrix was a paid, fulltime union organizer, intent upon organizing Respondent's employees, is of no moment. *H.B. Zachry Company*, fn. 24, *supra*, at sl. op. (JD)4.

[32] Crediting Macomber's convincing and uncontroverted account.

3. Respondent's resolute antiunionism also is revealed by Rose's telling Hendrix in their early conversations that it was "nonunion and wanted to stay that way"; and by his later saying much the same to Jones.[33]

4. Hendrix gave Respondent cause to believe he would be an aggressive and dedicated organizer. Beyond being paid to organize, he proposed to Imdieke and Rose that Respondent enter into an agreement with the Union, he urged them to use the Union as a manpower source and submitted applications on behalf of a number of members, he picketed and leafleted to protest Respondent's wage and benefit levels, and he candidly told Rose that, if hired, he would organize during nonwork time.

5. Respondent plainly saw Hendrix as an organizational threat. Thus, Rose entered in his log after their first meeting that Hendrix gave him "the impression that" the Union had "targeted [Respondent] for infiltration of union members"; Rose discussed "the union issue" with Imdieke and Johnson after his second conversation with Hendrix, and they decided not to give out applications "until all angles have been checked"; Rose and Johnson had a follow-up conversation dealing with "hiring policies concerning union help, discrimination"; Imdieke conferred with Respondent's labor counsel before answering Hendrix's request for an application; Rose forwarded only Hendrix's application to Imdieke, whereupon Imdieke again conferred with labor counsel; Rose told Casavant, when Casavant submitted his application, that Hendrix had "come by" and Respondent "might be going union";[34] Rose told Hendrix he "wouldn't like" his organizing during nonwork time, were he to be hired; and Rose questioned Brooks whether he knew

[33] Citing *Indian Head Lubricants*, 261 NLRB 12, 18 (1982), the General Counsel argues that Respondent's union animus also is shown by the remarks of Rose's son, Todd. I need not address that in light of abundance of other indicia.

[34] Crediting Casavant's unchallenged testimony.

Hendrix, whom he identified as "our little union buddy," after Hendrix had engaged Brooks in conversation while leafleting at the jobsite.

6. By telling Hendrix on December 30 that, although Respondent was then hiring, his application had not been considered because "it's kind of hard to hire you when you're out there on the other side, picketing,"Rose effectively admitted that Hendrix's protected activities were a factor in his nonhire.[35]

I further conclude that Respondent has failed to overcome the *prima facie* showing. As Respondent states in its brief, incorporating Rose's and Imdieke's testimony, its principal reason "for refusing to hire Hendrix was that neither Rose nor Imdieke took his application seriously. . . since it was submitted pursuant to, and in furtherance of his full-time union employment responsibilities." This is an admission on improper motive.[36] Far from overcoming the *prima facie* case, it bestows conclusivity.[37]

Respondent contends that it had an additional, less basic, reason for not hiring Hendrix--that he had indicated on his application that he was interested only in a foreman's job, and none was available. As earlier noted, Hendrix entered "Journeyman-Foreman Electrician" where the application asked for "Position Desired." Rose never sought clarification from Hendrix about this, however, which he surely would have done, given the equivocal form of the entry, had he an open mind about Hendrix; and the weight of evidence is overwhelming that the application would not have been taken any more seriously had Hendrix written "Journeyman Electrician."

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[35] As I earlier conclude, this remark was unlawful. See text accompanying fn. 25, *supra*.

[36] The record being devoid of evidence that Hendrix applied in bad faith, with no intention of taking a job if offered.

[37] *H.B. Zachry Company*, fn. 24, *supra*, at sl. op. (JD) 4.

c) Haugen

I conclude that the General Counsel also has made a *prima facie* showing that Respondent's failure to hire Haugen violated 8(a)(3) and (1). My reasons for so concluding, in addition to the previously-detailed indicia that Respondent has a policy against hiring known union members and otherwise is ardently antiunion, are:

1. Haugen, like Hendrix, apparently is a competent journeyman.

2. The weight of evidence reveals that Respondent was still seeing journeymen when Haugen applied on December 28, and for at least several days after. Thus, when Haugen first told Rose on the 28th that he is a journeyman, Rose exclaimed, "Oh, great!" and urged Haugen to apply "right away";[38] then, on the 30th, Rose told Hendrix he was "looking for guys"; and Rose informed journeyman Joseph Lesh in early January that he "would be hiring."[39] Additionally, Rose informed the Employment Service on December 27 that he invited the referral of "journeymen and other experienced electricians," leaving that directive undisturbed until January 13; and one of the local-area journeymen hired by Respondent, Casavant, did not receive confirmation of his hire until January 3.[40]

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[38] Crediting Haugen. Rose recalled saying, "Good," and inviting Haugen to come to the site. I do not credit Rose that he told Haugen, after he had filled out an application, that Respondent "didn't need any more journeyman electricians" because he had "made up [his] mind who [he] was going to hire." That testimony was not convincingly rendered, and, as is elsewhere noted, conflicts with the information Rose gave to the Employment Service on December 27, to Hendrix on the 30th, and to Joseph Lesh in early January.

[39] Lesh, uncontroverted, is credited.

[40] Crediting Casavant. Respondent states in its brief that Casavant testified "that he had been offered employment in early December and that he quit his other job in reliance upon that offer." This is not accurate.

3. Rose's asking Haugen if his past employers were unionized was, as previously observed, "a thinly-veiled inquiry into Haugen's union feelings";[41] and, from Haugen's affirmative response, Rose had reason to surmise that he is a member.

I conclude, finally, that Respondent has not overcome the *prima facie* showing. Its defense is based on Rose's testimony that he "had made up [his] mind" before December 14 "who [he] was going to be putting on as a journeyman," and that he had made commitments to the three hired on December 1 (Casavant), December 15 (Gauthier), and December 27 (Jones). That story is fundamentally impeached, however, by the considerable evidence, summarized above, that Rose was still seeking journeymen when Haugen applied on the 28th, and for some days thereafter; by the records of the Employment Service, which disclose that he advised it on December 14 that Respondent "need[ed] journeymen and other experienced electricians"; and by the passage in his affidavit that he "was actually looking for . . . 5 journeymen" when he placed the December 14 order with the Employment Service.

IV. Conclusions of Law

Respondent violated section 8(a)(3) and (1) by failing to hire Michael C. Hendrix and Allen Haugen, effective January 3, 1989.

Respondent, by its project foreman, Douglas Rose, further violated Section 8(a)(1) as follows:

Casavant testified, as earlier set forth, that Rose told him in early December that he "probably" could start on January 3 or 4, and that he quit his job on December 23 because he was "tired" of it and "thought [he] had a pretty good chance of getting this job" with Respondent.

[41] As I earlier conclude, this interrogation was unlawful. See text accompanying fn. 22, *supra*.

a) In late November 1988, by asking applicant Jerry Jones if he was "still affiliated with the Union" and how he felt "about working for a nonunion shop."

b) In late November 1988, by telling Jones that Respondent "is nonunion and it intends on staying nonunion."

c) On December 28, 1988, by asking Haugen if his past employers were unionized.

d) On December 30, 1988, by telling Hendrix that he had not "considered" Hendrix's application because "it's kind of hard to hire you when you're out there on the other side, picketing."

e) On January 9, 1989, by asking employee Lafayette (Dean) Brooks if he knew Hendrix, "our little union buddy."

f) In mid-January 1989, by telling Jones that a no-applicants sign was "just for the Union's benefit."

g) On February 7, 1989, by asking Jones if an NLRB agent had called him.

Recommended

ORDER[42]

Respondent, Willmar Electric Service, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

a) Failing to hire Michael C. Hendrix, Allen Haugen, or any other statutory employee because of their sympathies or activities on behalf of International Brotherhood of Electrical Workers, Local Union No. 46, or any other labor organization.

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[42] All outstanding motions inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

b) Interrogating job applicants about their union affiliations, their feelings about working for a nonunion employer, or whether their past employers were unionized.

c) Telling job applicants that Respondent is nonunion and intends to stay nonunion.

d) Telling job applicants that it has not considered their applications because of their union activities.

e) Coercively interrogating employees whether they know certain officials of International Brotherhood of Electrical Workers, Local Union No. 46, or any other labor organization.

f) Telling employees that a no-applicants sign is "just for the Union's benefit."

g) Coercively interrogating employees, during the pendency of an unfair-labor-practice charge against Respondent, whether they had been called by an NLRB agent.

h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights protected by the Act.

2. Take this affirmative action, to effectuate the purposes and policies of the Act:

a) Offer Michael C. Hendrix and Allen Haugen full and immediate employment in the positions, or their substantial equivalents, in which they would have been employed, effective January 3, 1989, but for Respondent's unlawful discrimination against them, without prejudice to any seniority or other rights or privileges they would have acquired; and make them whole, with interest where appropriate, for any losses of earnings and benefits suffered as a result of that discrimination.[43]

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[43] Backpay shall be computed as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Under *New Horizon*, interest is computed at the "short-term federal rate" for underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

b) Preserve and on request make available to the Board or its agent, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful to determine the amount of backpay due under the terms of this Order.

c) Post at its J.C. Penney project in Silverdale, Washington, and at its headquarters in Willmar, Minnesota, copies of the attached notice, which is marked "Appendix."[44] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt, and maintained for 60 consecutive days, in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

d) Notify the Regional Director for Region 19, in writing within 20 days from the date of this Order, what steps Respondent has taken to comply with it.

Dated: September 1, 1989

RICHARD J.BOYCE
Administrative Law Judge

[44] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The trial held in Seattle, Washington, on April 6-7, 1989, in which we participated and had a chance to give evidence, resulted in a decision that we have committed unfair labor practices in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, and this notice is pursuant to that decision.

Section 7 of the Act gives employees these rights:

To organize themselves;
To form, join or support unions;
To bargain as a group through a representative they choose;
To act together for collective bargaining or other mutual aid or protection;
To refrain from any or all such activity except to the extent the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

WE WILL NOT fail to hire Michael C. Hendrix, Allen Haugen, or any other statutory employee because of their sympathies or activities on behalf of the International Brotherhood of Electrical Workers, Local Union No. 46, or any other labor organization.

WE WILL NOT interrogate job applicants about their union affiliations, their feelings about working for a nonunion employer, or whether their past employers were unionized.

WE WILL NOT tell job applicants that we are nonunion and intend to stay nonunion.

WE WILL NOT tell job applicants that we have not considered their applications because of their union activities.

WE WILL NOT coercively interrogate employees whether they know certain officials of International Brotherhood of Electrical Workers, Local Union No. 46, or any other labor organization.

WE WILL NOT tell employees that a no-applicants sign is "just for the Union's benefit."

WE WILL NOT coercively interrogate employees, during the pendency of an unfair-labor-practice charge against us, whether they had been contacted by an NLRB agent.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights protected by the Act.

WE WILL offer Michael C. Hendrix and Allen Haugen full and immediate employment in the positions, or their substantial equivalents, in which they would have been employed, effective January 3, 1989, but for our unlawful discrimination against them, without prejudice to any seniority or other rights or privileges they would have acquired; and WE WILL make them whole, with interest, for any losses of earnings and benefits suffered as a result of that discrimination.

WILLMAR ELECTRIC SERVICE, INC.

_____

(Employer)

Dated_____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 915 Second Avenue, Room 2948, Seattle, WA 98174-1078; telephone: (206) 442-7472.